JESSE HUTCHINGS

IBLA 95-103 Decided March 1, 1999

Appeal from a decision of the Area Manager, Ridgecrest Resource Area, California, Bureau of Land Management, ordering payment of damages for mineral trespass. CA-29375; CA-29376.

Affirmed in part, reversed in part, and remanded.

1. Trespass: Generally

When a mineral materials purchase and sales contract expires, subsequent removal of mineral material is an act of trespass.

2. Trespass: Measure of Damages

Evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willful trespass. Standing alone, knowledge that specific behavior is regulated will not support a finding that the violation was willfully committed or a finding that it was committed with reckless disregard. The test is the trespasser's actual intention at the time of the violation.

APPEARANCES: Lester F. Whalley, Esq., Torrance, California, for Appellant; Lee Delaney, Area Manager, Ridgecrest Resource Area, Ridgecrest, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Jesse Hutchings (Hutchings or Appellant) has appealed from an October 24, 1994, Decision of the Ridgecrest Resource Area Manager, Bureau of Land Management (BLM), finding that Hutchings extracted and sold 3,693 tons of clay in willful trespass on mineral material sales

contracts CA-29375 and CA-29376 between January and September 1994, following expiration of both sales contracts on December 31, 1993. 1/

The record discloses that on October 29, 1993, Hutchings wrote to Dave Taylor, a BLM employee, as follows:

> Enclosed please find copies of our last Mineral Sales Contract with the BLM which expires on December 31, 1993. As per our telephone conversation, I would like to enter into a five (5) year Mineral Sales Contract on both of these sites. On old contract #29375 I would like to contract for 10,000 tons. On old contract #29376 I would also like to contract for 10,000 tons. Please send me the contract and the dollar amount required for the renewal to the address above. Along with the copies of the old contract we have sent copies of your letters of renewal for your reference.

Taylor replied on January 5, 1994, by furnishing two forms of sales contract with a note stating:

> Jess. Please sign both contracts and send them back with C.D.'s for #33708 and one for #33707 principal payable to U.S.D.I.B.L.M. with interest going to your bank account or send 2 $700.00 checks if you do not care about the interest. Also send 2 checks for at least $1000 each for each contract or pay them in full if you wish. Contact Buzz Todd if you have any questions. Dave T.

These contracts were not returned by Hutchings until October 6, 1994, on which date Hutchings submitted the signed contracts to BLM. Each of the contracts returned by Hutchings to BLM provides for the purchase of 10,000 tons of clay; each contract is dated "this day of January, 1994," and is signed by Jesse Hutchings, President." Included with these documents was a letter and checks totalling $3,900. The covering letter, also signed by Hutchings, states:

> Enclosed please find the signed contracts numbers CACA-33707 and CACA-33708. Also enclosed is a $700.00 Certificate of Deposit for each contract for Reclamation and a $1250.00 check for each contract for material sales as per instructions from Dave Taylor. I would like to thank you for processing these contracts in a timely manner.

Shortly after receipt of this filing from Hutchings, BLM issued its October 24, 1994, decision, assessing triple damages for trespass.

1/ On Jan. 11, 1995, the Board refused to stay BLM's Decision finding Hutchings had removed the clay in trespass, determining that his denial that he acted in trespass lacked factual support because there was no evidence of the existence of a sales contract after December 1993.

In his Statement of Reasons (SOR) for appeal, Appellant denies that he removed clay from the Federal lands in trespass, stating that he was a "permittee * * * who was authorized to remove mineral materials." (SOR at 8.) Hutchings argues by analogy to state law that, although his sales contracts expired in 1993, there was nonetheless an enforcible oral contract in effect for the clay he removed between January and September 1994. (SOR at 2, 4, 6, 7, 8, 9, 10.) This conclusion is based on the existence of the two contract forms offering to purchase clay over a 5-year term that Hutchings filed with BLM on October 6, 1994, which he states were prepared for him by BLM and sent to him by BLM at his request prior to the expiration of the original sales contracts.

The law that applies in this case is provided by section 1 of the Materials Act of 1947, 30 U.S.C. § 601 (1994), and Federal regulations implementing the Act at 43 C.F.R. Part 3600. The state law cited by Appellant in support of his arguments advanced on appeal has no direct application to the trespass question at issue in this case. An application for a material sale is initiated, under rules promulgated by the Department for such disposals, "upon receipt of a written request." See 43 C.F.R. § 3610.1-1. There is no provision in the regulations for an oral application, such as Hutchings now suggests was made, and the record demonstrates that no such arrangement was contemplated by the parties.

The submissions which Hutchings made on October 29, 1993, are an acknowledgement that he understood that a written application on a form approved by BLM was necessary if he were to buy clay from BLM. He stated in his letter to BLM, quoted above, that he wanted new contract forms so that he might purchase a total of 20,000 tons of clay. When he signed and returned the forms to BLM after removing the clay, he again indicated that he understood the need for a written application to BLM for the purchase. Without approval from BLM's authorized officer, however, the tardy application was ineffective to retroactively accomplish a purchase agreement for sale. 43 C.F.R. §§ 3610.1-1, 3610.1-3.

[1] As noted above, the original contracts expired on December 31, 1993, by their own terms. Any further removal of this mineral material was without the benefit of a mineral materials sales contract. The unauthorized extraction, severance, or removal of mineral materials subject to mineral materials sales contracts is an unauthorized use of the public lands. See 43 C.F.R. § 3603.1, which also specifies that unauthorized users shall be liable for damages to the United States as set out in 43 C.F.R. Subpart 9239. The regulation at 43 C.F.R. § 9239.0-7 supports the conclusion that removal of mineral material from BLM land after the expiration date of the contract was an act of trespass. That regulation provides that the "extraction, severance, injury, or removal of * * * mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States * * *."

Invoking the doctrines of estoppel and laches, Hutchings also contends BLM may not now declare his actions constituted trespass because he filed monthly reports of his excavation and sales with BLM beginning in 1994. Thus, BLM knew or should have known that he was removing clay after the expiration of his sales contracts in December 1993. This argument is rejected. The authority of the United States to enforce its laws is not lost by the neglect of BLM employees in the performance of their duties. 43 C.F.R. § 1810.3(a). Moreover, estoppel can be applied against the Department only in cases where there has been detrimental reliance on a written decision issued by an authorized officer. See Steve E. Cate, 97 IBLA 27, 32 (1987). No such document is claimed to exist in this case.

[2] The exact nature of Hutchings' trespass has direct bearing on the outcome of this decision. When the mineral material is removed by a trespasser having a bona fide, but mistaken, belief that he had a right to remove it, the removal can be said to be a "nonwillful" trespass. 2/ In this case, section 10(b) of Hutchings contracts, which expired in December 1993, provided, in pertinent part: "If purchaser extracts or removes any materials sold under this contract * * * after expiration of the time for extraction or the cancellation of this contract, such extraction or removal shall be considered a willful trespass and render Purchaser liable for triple damages."

It is evident from Hutchings' communications with BLM that he had knowledge of the permit process at the time of the trespass. Standing alone, this fact does not establish that Appellant either knowingly removed the mineral material or acted in reckless disregard of its ownership. Mere knowledge that specific behavior is regulated by a statute or regulation does not support a finding that the violation was willfully committed, however. See Trans World Airlines, Inc. v. Thurston, supra at 127-28. As stated in Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037, 1042 (Ky. 1934): "The test is not the trespasser's violation of the law in the light of the maxim that every man knows the law, but his sincerity and his actual intention at the time." See also United States v. Homestake Min. Co., 117 F. 481, 485-86 (8th Cir. 1902).

Appellant had recently completed removal of clay on a contract, identical in terms (other than the number of tons) to the one he was requesting, and that contract explained that he would be liable in willful trespass for removal after expiration of the contract. While it stands to reason that he had knowledge of the effect of the removal of the material without a valid contract, Appellant was nevertheless reporting regularly his removal of clay from the contract areas, clearly

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2/ The Department also recognizes the same two forms of trespass in other contexts. For example, 43 C.F.R. § 5400.0-5 defines willful trespass as "a knowing act or omission that constitutes the voluntary or conscious performance of a prohibited act or indifference to or reckless disregard for the law."

indicating his understanding of his responsibility to BLM. Thus, while the record supports BLM's finding that between January and September 1994, Hutchings removed material from BLM land in trespass, it does not support a finding that he recklessly disregarded his obligation to obtain a contract for removal of mineral material and was thus liable in willful trespass for treble damages.

The record shows that although payment for the materials removed in 1994 was not offered to BLM until October 6, 1994, it had been contemplated prior to expiration of the original contracts, and communications to that effect had been timely consummated. More importantly, while subjective, Hutchings clearly believed that he had a continuing agreement with BLM based on past dealings. Hutchings good faith on this point is supported by the fact that he was regularly reporting his removals of clay to BLM throughout 1994. Clearly, he expected to pay for the clay and he was in no way trying to deceive BLM concerning its removal. An individual in his position might reasonably expect that BLM would contact him if anything were amiss. A person who sought to intentionally remove clay through deception and without paying would scarcely alert BLM to his actions on a continuing basis.

Thus, while Appellant was clearly derelict in not returning the contract and submitting the funds in a more timely manner, this merely determines, under the circumstances set forth above, that his removals were in the nature of a nonwillful trespass. The record before the Board cannot justify a finding of willfulness.

Hutchings further argues that BLM should not retain the money he paid in October 1994 with his tardy application for purchase. It is not disputed, however, that he removed 3,693 tons of clay between January and September. The money he sent to BLM included $2,500 which was, according to the cover letter received by BLM on October 6, 1994, for purchase of the clay removed from BLM lands. Hutchings is liable for nonwillful trespass payments for the clay actually removed. Obviously, BLM must refund any amounts found not to be owing. Insofar as the $1,400 for reclamation is concerned, no funds may be returned until reclamation is completed.

To the extent Hutchings has raised arguments that are not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part as it relates to BLM's determination that Appellant removed clay in trespass during 1994, reversed in part as

to BLM's determination of willfulness on Appellant's part, and the case file is remanded to BLM for computation of the proper penalty for a nonwillful trespass.

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James P. Terry
Administrative Judge

I concur:

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James L. Burski
Administrative Judge